SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss.

MISCELLANEOUS CASE
No. 12 MISC 458553 (GHP)

ROBERT DELPRETE,

Plaintiff,

v.

ROCKLAND ZONING BOARD OF APPEALS; THOMAS RUBLE as he is BUILDING INSPECTOR and ZONING ENFORCEMENT OFFICER OF THE TOWN OF ROCKLAND; TOWN OF ROCKLAND; and ROCKLAND BOARD OF SELECTMEN,

Defendants,

and

SUSAN A. JOYCE and THOMAS J. JOYCE,

Interveners.

DECISION
FOLLOWING REMAND
FROM THE APPEALS COURT

I. INTRODUCTION

Judgment entered in this action July 2, 2013. In the appeal of this case in the Appeals Court, No. 2013-P-1749, the Appeals Court vacated that judgment, and remanded to this court

for further proceedings consistent with the memorandum and order of the panel of the Appeals Court, dated February 4, 2015, issued by it pursuant to its Rule 1:28. Rescript issued March 4, 2015. DelPrete v. Zoning Bd. of Appeals of Rockland, 87 Mass. App. Ct. 1104 (2015). The remand was "for the limited purpose of consideration of the factors which may inform an equitable remedy determination...." The Appeals Court upheld the remainder of this court's judgment.

In compliance with the remand ordered by the Appeals Court, the court conducted a trial at which the parties presented evidence relevant to the limited issue for which this case was returned to this court. In this decision the court renders its findings of fact and rulings of law on the issues the Appeals Court directed this court to consider further.

II. BACKGROUND AND PROCEDURAL HISTORY

The factual background and procedural history of this case leading up to the appeal is recounted in the court's decision, dated July 2, 2013, which directed the entry of the judgment entered that day, and does not require elaborate repetition in this decision following remand.

Robert DelPrete ("plaintiff" or "DelPrete") commenced this case in this court on January 26, 2012 as an appeal, pursuant to G.L. c. 40A, § 17, of a decision of the Rockland Zoning Board of Appeals ("Board"). The Board's challenged decision,[1] issued on administrative appeal, upheld actions taken by the building inspector in ordering a building permit issued to plaintiff revoked in response to an enforcement request from Susan A. Joyce and Thomas J. Joyce ("interveners") under G.L. c. 40A, § 15; the Board also denied Plaintiff's alternative request--for a variance. On

[1] The challenged decision was filed with the Town Clerk on January 17, 2012 following public hearing on January 3, 2012.

March 29, 2013, the Town of Rockland Board of Selectmen and the Town of Rockland ("Town") joined the case as parties to a counterclaim for enforcement under G.L. c. 40A, § 7. The subject property ("Property") is known as 320 Concord Street, Rockland, Plymouth County, Massachusetts.[2] It is undisputed that the Plaintiff's lot, Lot 1 as laid out on the recorded 1999 Avery ANR Plan, is deficient as to the frontage, lot width, and area required in the relevant zoning district, R-1. That 1999 plan contains a clear notation that Plaintiff's Lot 1 did not meet the zoning requirements then in effect. Lot 1 was redrawn from its configuration in an earlier, 1992 plan; the revision of the property lines gave frontage and land to what is now the Interveners' lot, and took away frontage and land to render Plaintiff's current Lot 1 with less than the local law requires.

In March of 2013, the court held an initial hearing on cross-motions for summary judgment. The court ruled in part on those motions in favor of the municipal parties, and then deferred proceeding to final judgment to afford the plaintiff an additional opportunity (as his counsel had requested) to demonstrate why equitable considerations might operate to bar the municipality's ability to enforce its zoning bylaw or to require the Board to have granted the requested variance. After receiving and considering the supplemental submissions of the parties on these questions, on July 2, 2013 the court issued its decision, granting summary judgment in favor of the defendants, and upholding the challenged decision of the Board. The judgment that entered that day affirmed both the Board's denial of the plaintiff's variance request, and the Board's decision finding that Zoning Enforcement Officer's decision (revoking the building

[2] The Property is described in the deed from Frank P. DelPrete and Dominic M. DelPrete to Robert F. DelPrete, dated March 10, 2010 and recorded on April 12, 2010 at the Plymouth County Registry of Deeds at Book 38415, Page 73.

permit) was proper. The judgment also made the following order with respect to the municipality's enforcement request: "Ordered that the Board and the Building Inspector and Zoning Enforcement Officer for the Town of Rockland are to take all appropriate action in light of the Court's Decision and this Judgment."

The judgment that entered on July 2, 2013 said nothing more on the Town's request for enforcement of the zoning bylaw against DelPrete and the Property. At the time the judgment entered, there was not in effect in the Town any order or directive that the house DelPrete had erected on the Property be altered or demolished. There was no "tear-down" order of any sort before the court. DelPrete had appealed to the Board administratively from the Zoning Enforcement Officer's revocation of the building permit, and, in the alternative, had applied to the Board for a variance to allow the building to remain on the sub-sized parcel. The Board had turned down those two alternative requests, and it was the decision by the Board to that effect (and nothing more) that was before this court on appeal under G.L. c. 40A, §17.

DelPrete's position--that equitable principles granted him some benefit--was considered by the court, prior to entering judgment, in two ways. First, DelPrete argued that the equities of his case required the Board to have granted the variance that it denied. The court, after reviewing the controlling decisional law, disagreed, ruling that issuance of a variance was not compelled in these circumstances. The Appeals Court agreed. "Because the lot in this case does not meet the necessary statutory requirements and a building permit cannot estop a municipality from enforcing its zoning by-law, ... the board's decision to deny a variance was not based on a legally untenable ground; nor was it unreasonable, whimsical, capricious, or arbitrary....." (slip. op. at 3-4)(footnotes omitted).

Second, this court considered whether DelPrete could bring these same equitable principles to bear to estop the municipality from proceeding with enforcement of its zoning law. This court concluded that the municipality could not be, as a general matter, estopped from enforcing its zoning laws, even if, as DelPrete had claimed, he had received his permit to build in good faith and had relied upon it in all innocence to go ahead with the construction of the dwelling on the Property. Even accepting, for the purposes of the summary judgment motions only, that that is what happened, the court concluded that the law did not stop a municipality from moving ahead with enforcement of its zoning bylaw. Based on this conclusion, the court ruled, as a matter of law on the uncontested facts in the summary judgment record, that the Town was not estopped from proceeding with enforcement of the zoning by-law. The court expected that the municipal officials then would move ahead with appropriate enforcement of the local zoning law, fashioning a lawful and appropriate order to address the violation. This court in no manner required any particular order or remedy for the Town officials to pursue. The court intended that they would decide on an appropriate enforcement order, and that there would be a right on DelPrete's part to take a further administrative appeal from any such order.

The Town did not wait long to act. On July 10, 2013, just a week and a day after this court's judgment entered, and while the period for noticing an appeal from the judgment to the Appeals Court was still running, the Rockland Building Inspector and Zoning Enforcement Officer sent a letter to DelPrete, titled "Order to Remedy Zoning Deficiency or Tear Down." In this letter, Mr. Ruble, referring to this court's July 2nd decision and judgment, ordered the plaintiff to provide proof of acquisition of the additional land necessary to remedy the zoning deficiencies, or to apply for a demolition permit and to commence the demolition of the house at

320 Concord Street within thirty days.

On August 1, 2013, DelPrete's lawyer timely filed a notice of appeal to the Appeals Court from the July 2, 2013 judgment. On November 7, 2013, DelPrete entered his appeal of the Land Court decision in the Appeals Court.

Upon receipt of the rescript, this court issued an order inviting the parties' views on how the Land Court best ought to carry out the task assigned to it by the Appeals Court. At hearings this court held on this question, the parties generally agreed that Appeals Court's memorandum and order had directed that this court take up the question whether this case was an appropriate one for an "equitable remedy for a zoning by-law violation," which is a reference to a remedy other than requiring physical removal of the house DelPrete had constructed. The parties and the court agreed that the Appeals Court panel directed this court to take this question up on remand, even though, at the time judgment entered, there had been no order issued by Town officials that required demolition. The question whether, as an equitable matter, the Town could not insist upon demolition of the house was one never considered by the Land Court when the case was before it, precisely because the Town never ordered demolition, or any other remedial action, before the Land Court judgment had issued. What this court had evaluated in its judgment was whether equitable principles, if the basis for them could be established as a factual matter, would either require the issuance of a variance, or, as a general matter, bar the Town from enforcing its zoning bylaws. What this court had no occasion to consider was whether any particular remedy (other than the simple revocation of the building and occupancy permits) could be employed, and whether equitable considerations, if the facts justified them, might limit the range of remedies available to the Town in enforcing its bylaws.

The Appeals Court panel nevertheless put its focus on the availability of demolition as a proper remedy for the zoning violation on the Property. Undoubtedly, the panel grew concerned with this tough question because, after the entry of judgment in the trial court and before the argument of the appeal in the Appeals Court, the Town was pressing ahead, on the strength of the judgment then under appeal, to require DelPrete either to add more land to solve the dimensional deficiencies of his lot, or to remove the structure he had built on the land illegally.[3]

When the case returned to this court, I took up with the parties the best way to proceed in light of the remand from the Appeals Court. The parties and the court considered whether the proper approach would be to allow another round of administrative action and appeal within the municipality–letting a demolition order by the Zoning Enforcement Officer get appealed administratively to the Board, and then have a judicial appeal under G.L. c. 40A, §17 from the Board's decision concerning the demolition remedy. This would have been the ordinary and expected approach, but for the Appeals Court's decision. That approach would have the benefit of having this vital question–whether a brand-new residence ought to be demolished–evaluated in the first place in the Town, by the local officials serving as members of the Board. Generally our zoning law prefers that decisions on such important local zoning matters be decided in the

---

[3] The Appeals Court panel concluded that this court had considered and rejected an opportunity for DelPrete to use equitable principles to avoid having to demolish the structure he built on the Property: "While a judge cannot order a town zoning board to grant a variance, he does have some discretion to grant an equitable alternative to a tear-down order. Here, the judge denied such a remedy." (slip. op. at 4-5) It is unclear how this court's judgment could have denied an equitable alternative to a tear-down order, when no order to tear down the dwelling had even been issued at the time judgment entered, much less considered by the Board on administrative appeal, or brought up to this court on judicial appeal. Other than the preliminary step of revoking the building and occupancy permits, no remedy for the zoning violation had been prescribed by any Town official prior to the entry of judgment in this case.

first instance in the town, by those who have been appointed locally.

Ultimately, however, I determined that allowing an initial municipal administrative proceeding--on the question whether an "equitable remedy" (i.e., one short of demolition) was available to save DelPrete's structure from being torn down--was not what the Appeals Court had ordered. I was directed by the panel to determine whether there existed in this case an occasion to exercise "some discretion to grant an equitable alternative to a tear-down order." I decided that the case would stand for trial on that issue. I determined to hear evidence on whether various factors, identified by the Appeals Court in its memorandum, existed which would authorize using equitable discretion to produce a remedy for the zoning violation other than demolition.

After allowing DelPrete (whose counsel had obtained leave to withdraw) additional time to secure new counsel, and to get ready for trial, I conducted a pre-trial conference in June of 2015. DelPrete, unable to retain successor counsel, represented himself at the conference and at trial.

I held trial in the Land Court on July 28, 2015. The parties introduced 24 exhibits (some in sub-parts) into evidence, as reflected in the transcript. Nine witnesses testified at trial: Robert DelPrete, Bette Burrill, and Sheree DelPrete were called by the plaintiff; Thomas Ruble, Marie Chase, Edward Kimball, Carol Brigham, Thomas Joyce, and Susan Joyce testified for the defendants and interveners. A court reporter, Wendy L. Thomas, was sworn to record the testimony and proceedings and produce transcripts. At the close of evidence, the court suspended the trial. After the transcript was filed, the parties submitted post trial briefs and requests for findings of facts and rulings of law, which were reviewed by the court, and the case was later

argued by Mr. DelPrete and defendants' and interveners' counsel. Upon receipt of the transcript of the closing arguments, I took the matter under advisement, and I now decide the case.

****

On all of the testimony, exhibits, stipulations, and other evidence properly introduced at trial or otherwise before me, and the reasonable inferences I draw therefrom, and taking into account the pleadings, and the memoranda and argument of the parties, I find the following facts and I rule as follows:

III. FINDINGS OF FACT

1. The property at issue has a street address of 320 Concord Street in Rockland, Plymouth County, Massachusetts. The structure Mr. DelPrete built on this formerly vacant lot is a two story dwelling, about 2,818 square feet in area, with an attached two car garage. The southwestern border of the Property abuts Concord Street. The northeastern border abuts a golf course property, controlled by the Simeone family, and sold to them by the DelPrete family. The neighbors to the northwest are Paul and Carol Brigham; Ms. Brigham is one of the plaintiff's sisters. The southeasterly neighbors are Thomas and Susan Joyce, the interveners, who live in a single-family home at 330 Concord Street. Concord Street here is in a residential neighborhood.

2. The Property at 320 Concord Street is located in a R-1 zoning district, which requires a minimum lot area of 32,670 square feet, and 110 feet of frontage.

3. The total lot size of the Property owned by DelPrete at 320 Concord Street is 28,937 square feet, 3,733 square feet short of meeting the minimum zoning area requirement for a buildable lot. The Property's only frontage is along Concord Street for 97.43 feet, 12.57 less than the zoning bylaw requires.

4. The Joyces purchased the property at 330 Concord Street from Frank P. DelPrete and Dominic M. DelPrete, Jr. in June of 2009. Their deed is recorded in the Plymouth County Registry of Deeds ("Registry") in Book 37344, Page 288. It recites a consideration of $175,000. It describes the conveyed land as Lot 2 on a plan ("1999 Avery Plan"), dated December 14, 1999, prepared by R.L. Avery, Surveyor, which was recorded in the Registry on March 13, 2000 as Plan No. 130 of 2000 in Plan Book 43, Page 204. The deed describes the land it conveys as having, according to that plan, 32,670 square feet. That area is the minimum area the Rockland zoning law requires in this district. Frank is the plaintiff's now-deceased father, and Dominic is Frank's brother and the plaintiff's uncle. When the Joyces bought their parcel, diligence was done through the bank making a mortgage loan and its counsel; through that process the Joyces and their lender determined that 330 Concord Street was a buildable lot meeting the area requirements of the Rockland zoning laws. Construction of the Joyces' home began in April of 2010; they lived at this address at the time of the proceedings in the Town concerning DelPrete's construction, and at all relevant times after that.

5. Robert DelPrete purchased the Property at issue in this case in around April, 2010 from his father and uncle. The deed is dated March 10, 2010, and recorded in the Registry on April 12, 2010 in Book 38415, Page 73. The deed recites consideration of $160,000, but not that the consideration was paid, although deed excise stamps based on that amount were purchased. DelPrete initially did not pay any of the stated consideration. Later, when he was pressed by his cousin Michael DelPrete, Dominic's son, regarding the share of the sales price for the land that ought have been paid to Dominic, Robert DelPrete eventually produced $80,000, one-half of the recited consideration. The evidence is not clear that any of this $80,000 came from funds

belonging to Robert. I find, in fact, that Robert did not pay his own funds in the amount of $80,000 to Michael on Dominic's behalf. Instead, the better view of the evidence, which I adopt, and find as a fact, is that that $80,000 was procured by Robert out of his father, Frank's, bank account funds. What the evidence certainly shows is that the half of the consideration recited in the deed which would have been due to Frank DelPrete, Robert's father, as a co-owner, was never paid. Robert testified that he was told by his father that this money was to be treated as "forgiven," but I find this testimony unpersuasive and do not credit it. In any event, all that Robert actually had to pay for the Property's acquisition was the belated payment of $80,000 with respect to Dominic's interest, and those funds Robert did not personally advance.

The deed describes the land being conveyed as Lot 1 on the 1999 Avery Plan, and indicates that, according to that plan, the land contains 29,937 square feet. DelPrete began construction of the house in May, 2010, and listed it for sale in June of that year. DelPrete purchased the Property, and built the dwelling on it, as part of his business as a builder and contractor. His plan was to sell the newly-constructed home to a third-party residential buyer. The house did not sell when on the market as a single-family home. A non-profit organization, Vinfen, inquired about purchasing the Property, exploring its availability for use as a group home, but that inquiry never resulted in a sale. DelPrete and his wife, Sheree, moved into the house only after he was unable to find a buyer.

6. Prior to acquiring the property, beginning in 2000 and 2001, DelPrete had one or more conversations with his father about getting title to the Property at 320 Concord Street, along with the property the Joyces currently own. Those parcels were owned by the elder DelPretes. DelPrete's father told him that he would not sell what became the Joyces' property because

DelPrete's uncle, who owned half of that building lot, was not willing to sell at that time. DelPrete's father told DelPrete that he would not sell DelPrete the Property at 320 Concord Street on its own because it was too small to be a lawful building site. DelPrete's sister, Marie Chase, was present for one such conversation that DelPrete had with his father, and testified that it was clear from the conversation that DelPrete definitely knew, long before he took title, that the Property, the lot in question in this case, was too small to meet the applicable zoning law requirements. I credit this testimony. In 2008, another of DelPrete's sisters, Carol Brigham, had a conversation with her father about the Property; he stated that the lot was too small, and therefore needed variances to be buildable lawfully. Ms. Brigham testified that DelPrete knew at this time that the Property was too small to meet the zoning requirements, and I believe her and so find.

7. There are at least two plans showing the land that is now the Property, 320 Concord Street, recorded in the Registry. One ("1992 Plan") is dated August 18, 1992, was prepared by David T. Gilmore, Surveyor, and was recorded with the Registry in September, 1992 as Plan No. 505 of 1992 in Plan Book 35, Page 396. The 1992 Plan does not show what is today DelPrete's Property as a separate lot as it now is located and configured. Rather, the 1992 Plan shows a Lot A directly abutting the lot already then owned by DelPrete's sister, Carol Brigham and her husband, Paul. The Brigham lot shows on the 1992 Plan as having 172.15 feet of frontage, the same frontage it has had at all times since. The abutting Lot A on the 1992 Plan is fully compliant with the area and frontage requirements of the zoning by-law. It is shown as having 32,670 square feet and 110 feet of frontage. The same is true for Lot B on the 1992 Plan. (These dimensions of Lots A and B are the minimum required in the R-1 District.) Lying between Lot A and Lot B on this 1992 Plan is a strip of land which forms part of a larger parcel

to its rear and to the rear of Lot A, Lot B, the Brigham lot, and other land with frontage on Concord Street. This strip between Lot A and Lot B is shown as having only 97.48 feet of Concord Street frontage, less than the zoning law required then and requires currently. The 1992 Plan has a cautionary notation, applying to this strip and the land to the rear of which it is part: "Not to be considered a buildable lot under the current zoning by-laws. (Lacks proper frontage)."

The other plan in the Registry is the 1999 Avery Plan. In the 1999 Avery Plan, the configuration of the land lying along Concord Street has been altered. The 1999 Avery Plan shows what is now DelPrete's Property as Lot 1. The square footage of Lot 1 is indicated to be 28,937 square feet, and its frontage is 97.43 feet, both less than the zoning requirements. The 1999 Avery Plan goes on to caution, in Note 3 on the face of the 1999 Avery Plan: "Lot 1 [(the Property, 320 Concord)] does not meet current zoning by-laws." What is apparent from comparison of the 1992 Plan and the 1999 Avery Plan is that the location of lots along Concord Street in the relevant stretch, between the Brigham parcel and the Chase parcel (Chase is another of DelPrete's sisters), was changed. The total distance along the Concord Street frontage remained the same: 317.43 feet. This distance allowed for two lots meeting the minimum frontage requirement of 110 feet each, with 97.43 feet left over. In the earlier 1992 Plan, the two zoning compliant lots, A and B, were positioned on either side of the 97.43 foot wide strip that then connected to more back land owned by the elder DelPretes. In the 1999 Avery Plan, what had been Lot B on the earlier 1992 Plan is shown, with the same 110 feet of frontage, as owned by the Tanzis. The remaining distance along Concord Street, now 207.43 feet, is divvied up differently on the 1999 Avery Plan than it was on the 1992 Plan. On the later plan, of that 207.43 feet, the 110 foot frontage belongs to Lot 2, abutting the Tanzi lot, leaving 97.43 feet of frontage

for a new Lot 1, which lies between Lot 2 and the Brigham lot. What this shows is that by the time of the 1999 Avery Plan, the strip with the insufficient frontage had been moved down Concord Street to the north and west, so that it abuts the Brigham parcel; this strip now was shown as a separate lot, Lot 1, and no longer as part of a larger parcel of back land. Lot 2 on the 1999 Avery Plan was sold to the Joyces. Lot 1 on that plan is the Property, which DelPrete later acquired and improved with the dwelling challenged in this litigation.

DelPrete did not hire a lawyer to represent him when he purchased the Property. He relies on this fact to say that he lacked awareness of the plans recorded in the Registry. Well before the purchase, however, DelPrete and his wife, Sheree, were living with Marie Chase in her home on Concord Street, a bit to the south and east of what is now the Property. This was during the period from October, 2001 to October, 2002. There were conversations at this time among these family members about the status and buildability of the land along Concord Street, still owned by the elder generation of the DelPrete family, lying between the Chase land and the land of another sister, Carol Brigham, whose house is located just to the north and west of what is now DelPrete's Property . Chase testified that during this time she had in her possession three copies of the 1999 Avery Plan, which she had received from her father. This makes sense, because that plan, among other things, shows a triangular Lot 3 which was designated to be added to the Chase parcel. Chase testified that a copy of the 1999 Avery Plan was given to Robert and Sheree DelPrete at this time. This plan, as I have found, was recorded in March, 2000 and contained a legend that Lot 1, the Property at issue in this case "does not meet current zoning requirements." I credit this testimony by Chase, and find that DelPrete at this time saw and was aware of the contents of the 1999 Avery Plan.

In 2010, DelPrete hired a land surveyor, Russell Allen Wheatley, to draw a new plan for the Property. The new plan ("Wheatley Plan"), dated March 8, 2010, two days before the date of the deed to DelPrete, was not prepared for the land records, but evidently in connection with the DelPrete's contemplated building of a dwelling structure on the land he now owns (Lot 1 on the plan of record, the 1999 Avery Plan). The Wheatley Plan shows the area of the Property as 28,937 square feet, and indicates setoff distances, from the lot's boundaries, of a proposed dwelling drawn on the Wheatley Plan. While the Wheatley Plan has legends giving the zoning requirements for front, rear, and side setback distances, this plan does not indicate that the lot's area is less than required in the R-1 District, and does not offer any explanation or indication about the fact that the lot, as drawn, has insufficient area and frontage to comply with the zoning bylaw. I find that DelPrete used the Wheatley Plan in his effort to procure the building permit for the dwelling he built on the Property. Nothing in the evidence shows that either of the two recorded plans, the 1992 Plan or the 1999 Avery Plan (both of which bore legends warning of zoning deficiencies) were furnished by DelPrete (or on his behalf) to the Town's officials when he sought the building permit.

8. On March 19, 2009, a broker, Trufant Real Estate, advertised that 320 Concord Street (shown as lot 70 on the listing sheet) was for sale. The lot was described as "[a]ttactive wooded lot located in an area with some newer homes. Varience [sic] will be needed to build." The phrase "varience will be needed to build" appears twice on the listing sheet.

9. DelPrete went to the Town's building department to inquire, ostensibly, whether 320 Concord Street would qualify a buildable lot. DelPrete first spoke with Bette Burrill, the department's administrative assistant, then with Thomas Ruble, the Building Commissioner and

Zoning Enforcement Officer for the Town. DelPrete and Burrill knew each other well, and had had a number of other amicable encounters in connection with other business DelPrete had previously with the Town's building department. Burrill had worked in the Town for many years, and in the building department since 1996. They had a conversation regarding the Property before Ruble came to the counter. The conversation between Burrill and DelPrete was about whether the plot of land was too small to build on, and whether the Property was on some basis, not well-explained in the evidence, "prior nonconforming" or "grandfathered," and so not subject to the current lot area and frontage dimensional requirements. DelPrete and Burrill referred to a marked up copy of the municipal assessors' maps at the counter. This map does not in any explicit way include information about whether lots shown on it are buildable as a matter of zoning compliance. DelPrete did not have with him at this time any plans for the construction of a structure on the Property. Ruble joined the conversation. Ruble was relatively new in the role of Zoning Enforcement Officer; Burrill had been in that office many years more. Ruble told Delprete that the lot he was inquiring about, Lot 1, was too small to meet current zoning law requirements. At some point after that, Ruble indicated to DelPrete that the Property appeared to have some status as a grandfathered, pre-existing nonconforming lot. He said this without conducting any research, but testified that he was just agreeing with what Burrill told him because she had worked at the building department for twelve years. The assessors' map had written on some of the lots in Town street numbers, which informally somehow signified the buildability of the numbered lots. These numbers had been added by a previous official in the department, likely a Mr. Jeffreys, and Burrill indicated to Ruble the connection between handwritten street numbers and some earlier indications of a lot's buildable status. Ruble told

DelPrete that his lot appeared to have some status as a buildable parcel because of the marking on the assessors' map, and because he was following the lead of Burrill.

10. On April 28, 2010, Ruble signed the building permit application, indicating his approval.

11. This was far from the first time DelPrete had dealt professionally with the building department of the Town. DelPrete is not a first-time home owner or builder. He is a licensed contractor. He has had considerable experience working with the Rockland building department and its employees and officials, including Burrill and Ruble's predecessors. As a builder who does remodeling work, DelPrete had done business at the department many times, including pulling permits about ten times at least prior to this instance, the one where he inquired about the Property at 320 Concord Street and then successfully applied for that building permit.

12. DelPrete had previously built and sold two houses in New Hampshire. A lawyer was used to assist DelPrete during both of those ventures. No lawyer got involved in the development and permitting of the dwelling house which is the subject of this case until the revocation of the permits by Ruble.

13. DelPrete financed the construction of the house with monies borrowed from South Coastal Bank of Rockland. He did not secure conventional mortgage-based land acquisition and construction cost financing. Instead, DelPrete entered into three separate consumer loan agreements to borrow sums totaling, in principal amount, $190,000. DelPrete's father, an experienced builder contractor, had a long and favorable banking relationship with this local area lender, and lent his credit to enable his son to borrow the funds. DelPrete's father is named as a co-borrower on all three agreements. Bank accounts owned by Frank DelPrete were pledged as

collateral to secure repayment of these loans. DelPrete failed to pay the interest and other amounts due on the loans, and the bank deducted the delinquent sums from his father's bank accounts with South Coastal. Eventually, as the loans from South Coastal went unpaid and into default, DelPrete's father's bank accounts were drawn upon by the bank to cover the total amount due in connection with this $190,000 of aggregate principal borrowing. South Coastal deducted the money from the father's accounts to cover the defaults when the loans were not being paid.

14. DelPrete's sister, Carol Brigham, has held a power of attorney from her father that has given her authority over their father's accounts since 2012. When DelPrete's loans in connection with the Property went delinquent, South Coastal contacted Brigham multiple times looking for Robert DelPrete. Unable to get in contact with DelPrete, South Coastal began deducting the loan amounts out of DelPrete's father's accounts to cover the delinquencies.

15. DelPrete testified that his father told him that he did not have to repay the loans. Brigham testified that, based on her conversations with their father, he did not feel he or his funds ought to be held responsible for paying the loans taken out from South Coastal to fund the project Robert DelPrete was constructing on the Property. Brigham testified, rather, that Frank DelPrete became upset when he discovered that the bank had deducted from his account the money due in connection with the loans. Frank viewed his role in these loans as a guarantor, and that he participated in them to facilitate funding for his son's independent house-building venture on the Property, and expected his son to be fully responsible for repayment of the borrowings. Frank DelPrete subsequently contacted an attorney and changed his will adversely to Robert. As to all of this, I find Carol Brigham's testimony to be candid and believable, I find that what she testified to is factually so, and I do not credit the contrary testimony of Robert DelPrete.

16. Brigham also stated that during this time period, their father's mental capacity was poor, as he was beginning to show signs of the early stages of dementia. I find that Robert DelPrete took advantage of his father's affection and of his declining acuity in his advancing years, and caused his father to commit considerable savings as collateral to support the borrowing of money needed to build the unlawful structure on the Property. By doing this, DelPrete not only secured bank funding that he would have had a difficult time receiving on his own credit. He also was able to use, without serious consequence to himself, borrowed money to build a structure that would not have survived legal scrutiny had he applied for a conventional mortgage-based construction loan. By lending funds fully secured by the father's bank accounts, the lender was able to dispense with the ordinary diligence that would have verified, before advancing funds, whether the Property was a buildable lot. By taking advantage of his relationship with his aging father, and getting him to post cash collateral for this ill-considered business project of Robert's, Robert ended up coming out of his loan default with little or no liability to the bank for his debt. His siblings have taken the position that Robert's borrowing for the project on the Property ended up stripping away funds that otherwise would have been available for the use of all the other family members. I find this is so.

17. Ruble issued the certificate of occupancy in April, 2011. The Joyces later raised concerns about the zoning status of the Property with Ruble. On October 4, 2011, Ruble sent DelPrete a letter ordering him to cease and desist all activities on the Property. Ruble stated in the letter that he was "not given the correct information concerning zoning/lot sizes on the building permit," the building permit and occupancy permit were "issued in error," and that DelPrete was ordered to apply for a dimensional variance with the Zoning Board of Appeals. The

letter concluded,"[i]n the event a variance is not granted or you do not apply, further action will be taken." The proceedings before the Board which were the subject of this G.L. c.40A, §17 appeal ensued.

18. The Chairman of the Board of Selectmen of the Town, Edward Kimball, testified. I credit his testimony generally, including that the officials of Rockland want, in the event the zoning dimensional deficiencies of the Property cannot be addressed in any other way, to require DelPrete to tear down the house he built, because the structure was built on a lot that is materially deficient as a matter of the duly enacted zoning law in the Town. Kimball testified credibly that many opportunities have been afforded DelPrete to resolve the Property's zoning violations, and that DelPrete has failed in each instance to achieve resolution. The requested variance was not approved, and could not lawfully have been. DelPrete has been given multiple opportunities to acquire additional land area and frontage to make up the shortfall. He has been rebuffed by abutters, including his sister, Carol Brigham, and the owners of the golf course, none of whom were willing to convey any land to DelPrete to add area or frontage needed to bring the Property into compliance. I accept Kimball's testimony that it is Rockland's position that it needs to have zoning compliance in this case to protect the rights of all property owners in the Town, to insure that the zoning laws have force and meaning, and to act in a fair and even way for all who come under the Town's zoning requirements.

IV. DISCUSSION

In its memorandum and order, the Appeals Court panel remanded this case to this court. The panel, concluding that I had "denied" an "equitable alternative to a tear-down order," see discussion infra, said that the "judge may very well be correct in ...[this] ruling. In an abundance

of caution, we remand only so that he may consider the balance of factors that may enter into such a calculus." The panel went on to list a number of factors which might bear on the availability of an equitable alternative to a tear-down order, and I now consider the relevant factors to decide if there are present, in the facts I have found after trial, sufficient grounds to say that an alternative to tearing down the house is indicated.

A. Substantial Hardship, Exhaustion of Other Ways to Bring the Property Into Compliance, and the Public Interest Served by Enforcement

1. Substantial Hardship

I am asked to consider whether tearing down the structure DelPrete erected on the Property would cause "substantial hardship." To frame this question this way is, essentially, to answer it. The tearing down of a newly-constructed house, for failure to comply with the dimensional lot size zoning requirements of a town's by-law, is, on its face, strongly indicative of substantial hardship to the owner of the improved land. There is no doubt that demolition of a perfectly-good, brand-new dwelling will constitute a hardship to the person who built the structure and owns it. The economic waste that results is obvious. Generally, however, removal of a structure is a proper and available remedy in cases such as this one, where the structure was built on an undersized parcel, and the missing lot area and frontage cannot be supplied by any other means. The very presence of the structure on a sub-sized lot--which never should have been built upon--constitutes a clear violation of the zoning law, and if the lot cannot be made bigger, then only by removing the structure can that violation be corrected.

In a tightly limited line of cases, our courts have said that such a substantial hardship, when considered along with other relevant factors favoring leniency, may in exceptional cases

call for a remedy short of demolition. In Marblehead v. Deery, 356 Mass. 532, 537-538 (1969), the town approved a plan for the subdivision of the defendant's property, including the construction of a new road located less than nine feet from the defendant's house. The Supreme Judicial Court allowed the house to remain standing even though it violated the town's zoning by-law. The court found that a tear-down would amount to a substantial hardship and impose great expense on the landowner. The court also found that the landowner greatly changed his position in reliance on approval from the town allowing his subdivision plan, there was no injury to a public interest, and all parties acted in good faith throughout the process. Id.

However, in Steamboat Realty, LLC v. Zoning Bd. of Appeal of Boston, 70 Mass. App. Ct. 601, 602 (2007), a renovation of a building in Boston's Back Bay violated the area's height requirement by four feet. The height increase was not included in the application for the building permit, nor did the city approve a plan that displayed the increased height, and the public's strong interest in maintaining the architectural integrity of the neighborhood was jeopardized by allowing the over-height construction to remain. The Appeals Court found that an equitable remedy short of removal of the offending, too-tall addition was not appropriate in that case; the zoning violation was more than a mere technical one. 70 Mass. App. Ct. at 606-607.

I draw from the cases that the substantial hardship inevitably brought about by a tear-down order is not, without more, a sufficient basis to abstain from requiring the removal of a structure. If that were so, then in almost every instance where a building exists in violation of zoning, the building could not be removed, simply because ordering demolition would work a substantial hardship. That is not the law. Buildings can be and are forced to be demolished to achieve compliance with zoning laws, if no other alternatives exist to remedy the violation, and if

other factors favoring an equitable remedy short of demolition are not present.

2. The Injury to the Public Interest; Whether the Zoning Violations are Merely Technical

Concluding that the inquiry does not stop simply because a demolition will produce, almost automatically, a substantial hardship in this case, I turn to the other factors that "enter into [the] ... calculus." I consider the nature of the public interest that the Town seeks to vindicate in enforcing its zoning law. I find that the Property at 320 Concord Street's zoning violations are more than just "technical" violations. The lot is 3,733 square feet short of being a buildable lot. That shortfall is not a de minimis one. The 28,937 square feet within DelPrete's lot are materially short of the 32,670 square feet the Rockland zoning law has at all relevant times required in this R-1 zoning district. The area deficiency represents almost thirteen percent of the land area of the Property, and 11.4 percent of the minimum lot size requirement. In raw numbers, 3,733 square feet of land area is not insignificant; many urban residential house lots are of that size or smaller. The Property's street frontage, measuring 97.43 feet, is 12.57 feet less than the law requires. The missing frontage is measured in feet, not inches, and represents an 11.4 percent shortage from what is legally required.

I recognize that in Deery, 356 Mass. at 536, the court concluded that an 11.45 foot violation of a zoning by-law that restricted structures from being maintained within 20 feet of any street line amounted to a technical violation. On the other hand, in Steamboat Realty, LCC, 70 Mass App. Ct. at 606-608, the court determined that a four-foot height violation was not a technical violation. I am called upon not merely to tote up the numbers, and calculate the percentages. I am to consider the intrinsic nature of the zoning violation, and use what I find to be its effect and importance in and to the Town and the immediate neighborhood to gauge

whether the violation is more substantial, or merely technical. Given the size and layout of the lots in this immediate neighborhood along Concord Street (including that of the abutting neighbors who testified), the overall planning and zoning goals reflected in the imposition of these dimensional requirements, and the testimony of both Town officials and neighborhood residents showing the importance of these requirements, I find, as a matter of fact, that the level of zoning violations existing on the Property fall well beyond mere technical violations and are matters of substantial concern and public interest in the Town.

It is in the public's interest to have the Town able to enforce its zoning by-laws. Wyman v. Zoning Bd. of Appeals of Grafton, 47 Mass. App. Ct. 635, 638-639 (1999) (the enforcement of a town's zoning by-law is a matter of public interest). Mr. Kimball, the Chairman of the Town's Board of Selectmen, testified convincingly that the officials of the Town earnestly believe that the Town requires meaningful efforts be taken to achieve full zoning compliance. In doing so, the Town acts to protect the rights and interests of all who reside and own property in the Town. Without concerted enforcement, the integrity of the zoning laws, and the willingness of those subject to them to follow them, will be diminished.

3. Exhaustion of Alternative Means to Achieve Zoning Compliance

Kimball also emphasized that, before proceeding with enforcement, Town officials had afforded DelPrete time and multiple opportunities to endeavor to correct the dimensional violations at the Property. See Building Inspector of Falmouth v. Haddad, 369 Mass. 452 (1976) (owners who obtained a permit to build a single-family residence but erected a motel must have an opportunity to obtain any permit necessary to adapt the structure to a use permitted as of right or by special permit before being compelled to demolish the structure); Sterling v. Poulin, 2

Mass. App. Ct. 562 (1974) (landowner using property in rural residential and farming district for commercial purposes was entitled to opportunity to convert building at issue to legal use permitted by the ordinance prior to the order requiring demolition of the structure); Stow v. Pugsley, 349 Mass. 329, 335 (1965) (court ordered structure that violated bylaw to be removed unless shown on a further hearing to be adapted and intended for a permitted use).

Although DelPrete was given abundant opportunity to cure the zoning deficiencies, he failed to do so. His neighbors, including his own sister, refused to convey land to help bring the Property into compliance. The neighboring golf course property owners, the Simeone family, asked for concessions from the DelPrete family (evidently seeking relaxation of restrictions placed on their land when it was sold to them by the DelPrete brothers) before the Simeones would convey land to Robert DelPrete to solve the area deficiency; DelPrete was unable to make that happen. By pressing for enforcement only after all efforts to resolve the zoning violations had been tried and failed, the Town shows that its motivations in enforcing the local zoning law are directed to the ultimate public interest of bringing land and buildings into compliance. I credit Selectman Kimball's testimony that the Town came to push for enforcement only after affording every alternative to DelPrete. Selectman Kimball further testified that DelPrete was not being singled out, as the Town is in litigation with owners of other commercial properties not in compliance with zoning, showing that the Town's enforcement actions are not focused on a single property or individual, but are directed to achieving the public interest of having zoning laws followed.

The authority of Rockland to regulate the use of private property through zoning by-laws derives from the Town's police power; these types of laws are enacted, fundamentally, to protect

the health, safety, and general welfare of its residents. Dimensional regulations typical of traditional zoning laws, like the ones being violated in this case, are valid and serve proper public legislative goals. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding local zoning regulations, and defining police power as the inherent power of the states to enact laws and otherwise promote the public health, safety, morals and general welfare). And once validly enacted, it surely is in the public interest to have the zoning laws in the Town of Rockland be followed. Wyman, 47 Mass. App. Ct. at 638-639. The Town's zoning laws would accomplish little if residents, land owners, or town officials disregarded them, or failed to see that they are carried out. The zoning requirements at issue here are not obscure. They are publically enacted, published, and available readily to any interested person. Indeed, in this case DelPrete has advanced no meaningful argument that the zoning dimensional requirements were not validly in force at all relevant times. He has not articulated any satisfying reason why the Property would have been "grandfathered" or otherwise not fully subject to these dimensional requirements. This is not a case where a basic review of the zoning law in the Town would not have demonstrated that the Property fell materially short dimensionally, and lacked any protected buildable status. In this case, the public interest in pursuing enforcement is at its most clear. I find that the violations are material, that DelPrete has "exhausted every possible option possible to bring this lot into conformity with the zoning by-law[,]" DelPrete, 87 Mass. App. Ct. at 1104 n. 12, and that, no other way to reach compliance being available, it is in the public's interest to have the zoning by-law enforced, including, should the Town ultimately so require, by requiring the removal of the structure.

B. The Plaintiff's Reliance on the Rockland Building Department and His Change of Position

The plaintiff contends that he relied on the information Ruble and Burrill provided to DelPrete when he visited the Rockland Building Department, and that he constructed the house because he was issued a permit to build by the Town's building official. A "municipality cannot ordinarily be estopped . . . from enforcing its zoning by-law or ordinance." Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 162 (1977). "The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance." Id.; see Ferrante v. Board of Appeals of Northampton, 345 Mass. 158, 162 (1962) (same).

Nevertheless, as the Appeals Court panel has instructed, I consider whether there exists, as an equitable factor to be taken into account in deciding whether a remedy short of demolition is indicated in this case, evidence that DelPrete greatly changed his position as a result of actions taken by a town official, and whether such reliance was reasonable. DelPrete, 87 Mass. App. Ct. at 1104. Having considered the testimony of the people involved, as trier of fact I find that it was wholly unreasonable for DelPrete to rely on the information he obtained from the building department representatives. I find that DelPrete well knew that the lot at 320 Concord Street was not buildable, at least without first obtaining a variance. I also find, in addition, that DelPrete did not substantially change his position as a result of any such reliance--because the major share of the funds used to pay for the project came from the DelPrete's father's bank accounts and, largely, not from the plaintiff himself.

1. DelPrete's reliance on the building department employees and the issuance of the permit was unreasonable

Before he ever proceeded with construction on the site, DelPrete had actual notice and knowledge that the lot at 320 Concord Street was too small to be built upon, at least without first obtaining a variance from the Board. There are multiple facts which I find show DelPrete knew that his lot was too small, lacked sufficient area, width, and frontage, and did not enjoy any grandfathered or other protected zoning status. Actual notice does not require notice "by actual exhibition of the deed. Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it . . . ." Emmons v. White, 58 Mass. App. Ct. 54, 65 (2003) quoting George v. Kent, 89 Mass. 16, 18 (1863).

First, the history of the Property and its creation as a sub-sized lot was no secret within the DelPrete family, the older generation of which, Frank and Dominic, had developed land in this immediate area over many years. They knew, of course, that there was not sufficient land area, nor adequate frontage along Concord Street, to meet the zoning dimensional requirements so as to afford this last lot lawful buildable status. In fact, the lot that the plaintiff now owns, the Property at 320 Concord Street, earlier was reconfigured of record to provide the minimum area required to another parcel--the lot on which the interveners built their house. The Joyces' land contains, not by coincidence, just the minimum allowed area and frontage. In carrying out this reconfiguration, which is apparent by comparing the 1992 Plan with the 1999 Avery Plan, the DelPrete family was acutely aware that the Property now owned by Robert DelPrete was being left with less area and frontage than what was required to build. And the plaintiff knew this early on. At least nine years prior to acquiring the Property, DelPrete and his father had a conversation in which Robert inquired about purchasing the plot of land at issue. His father declined to sell the

land to DelPrete. The father told the son the lot was too small upon which to build lawfully. Two of DelPrete's sisters, Brigham and Chase, were aware of this communication by their father to their brother, and both testified credibly that DelPrete knew the lot was not buildable. Chase stated that Robert "most definitely knew the lot was undersized." Knowing that the lot was too small to build on, DelPrete attempted to cure the problem by acquiring additional land that was part of surrounding properties, see Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266, 272 (2008) (carving additional property out of abutting lot would render the non-conforming lot conforming). He was unable to do so. During that time the co-owner of the abutting parcel, DelPrete's uncle, was not willing to sell the property to Robert DelPrete.

Brokers marketing the Property knew as well that the lot was too small and not a lawful building lot in the R-1 District. Trufant Real Estate listed the property for sale in March of 2009. The listing sheet twice stated that a "varience [sic] will be needed to build." I find it unlikely that the plaintiff would not have become aware of this widely-disseminated information. The disclosure provided to DelPrete by his father, and confirmed by the plain caveat on the property listing sheet, are "source[s] which [DelPrete] ought to give heed to[,]" Emmons, 58 Mass. App. Ct. at 65. Because his own father was an owner of the land at 320 Concord Street, and had abundant knowledge about its zoning noncompliance, DelPrete was given reliable information, became fully aware, and thereafter knew, that the land was unbuildable many years before finally acquiring title to the Property. The brokers' property listing restated in a public way that the lot needed variances before a building could be erected legally on the site.

Additionally, DelPrete had additional notice, at a minimum constructive notice, that the Property was unbuildable as a matter of zoning noncompliance. The plans recorded in the

Registry in the chain of title for this parcel were clear that there were zoning dimensional shortcomings afflicting what became DelPrete's Property. The 1992 Plan plainly called attention to the fact that the frontage along Concord Street between the Brigham and Chase parcels lacked enough length to create three lawful lots. The 1992 Plan had a legend warning that the shortfall, which left only 97.43 feet after subtracting two lawful lots each with 110 feet of frontage, meant that the zoning frontage laws could not be met for a third lot. The 1999 Avery Plan, recorded in March of 2000, warns of the problem of zoning deficiency for the Property in even clearer fashion. It says in note three: "[l]ot 1 [(320 Concord)] does not meet current zoning by-laws."

Not only was DelPrete on notice, prior to purchasing the land, that the lot was not in conformity with Rockland's zoning by-laws because his father told him that expressly, he also was on at least constructive notice of that reality based on the plans recorded in the Registry. While DelPrete relies on the fact that he did not hire counsel to represent him when he purchased the Property, using that to say that he was unaware of the recorded plans, I do not find this justifies the exercise of equitable leniency. DelPrete acted at his own peril when he consciously declined to pay a lawyer. DelPrete had used counsel in the past when buying other building sites. He was not a novice, and as a contractor had built houses and purchased land before, using lawyers. He should have known the risks of proceeding without title examination, and without counsel about the zoning and permitting issues that frequently arise in the business of home building. Indeed, had DelPrete financed this project more conventionally, with a mortgage loan, instead of in the way he did, relying on his aging father's bank accounts for collateral, it is entirely likely that a mortgage lender's legal diligence would have caught the glaring zoning

deficiencies of the project before funds were advanced and construction began.

More to the point, I find that DelPrete had received from his family, well before the time he acquired the Property and built on it, a copy of the recorded 1999 Avery Plan, which included the plain warning that the Property did not meet zoning requirements. Notwithstanding the fact that DelPrete did not hire a lawyer to examine title (a process which necessarily would have led to the plan in the Registry) I find that DelPrete had actual knowledge of the 1999 Avery Plan and its zoning noncompliance caveat.

Given this knowledge on DelPrete's part, and his experience in procuring permits and dealing with municipal building and zoning officials, I find that any reliance by DelPrete on statements made to him by officials of the building department, that the Property was a buildable lot, and on the issuance of a building permit, would have been entirely unreasonable. He ought to have known that to build on the Property, without delving much deeper into its zoning status, and without directly dealing with (and overcoming) the many clear warnings that the Property was unbuildable, was risky and dangerous. His decision to proceed without any good explanation why the Property could be considered a lawful building site, was the source of his current predicament, and his claimed reliance on the local building department officials rings hollow.

What I conclude took place is that DelPrete was fully aware that the Property did not comply with zoning law when he approached the building department. He had no good faith reason to think that the Property, undersized as it was, had any "prior nonconforming" or "grandfathered" status that would allow legal building. DelPrete simply took a shot. He tried to coax a building permit to which he was not entitled out of the Town official responsible for the matter. With the aid of Burrill, with whom DelPrete had a friendly relationship, he succeeded

when he knew he should have failed. It is not clear what DelPrete would have done had he been turned down for the permit he did receive. In truth, he had very little then to lose. He had taken title for no money actually paid, and faced little financial loss at that point. Unfortunately for him, his effort to get a permit to which he was not entitled succeeded. But the evidence convinces me that there was nothing reasonable in his reliance on the issuance of it.

2. DelPrete's change of his position has been much less substantial than it might have been

I also must consider the extent to which DelPrete may have changed his position substantially as a result of the actions taken by Ruble and the building department. While I do find that DelPrete did sustain losses as a result of having built on the Property after the building permit issued, his losses, thus far at least, are not as great as they otherwise would have been. This is because much of the money used to pay for the project came from DelPrete's father and his bank accounts. Contrast Deery, 356 Mass. at 538 (town kept from strict enforcement of its zoning law because, among other equitable considerations, the defendant greatly changed his own position in reliance upon a decision by the town). DelPrete and his father both are named as obligors on the South Coastal Bank consumer loan agreements, totaling $190,000 in principal borrowings, but when the loans went delinquent, they were paid back to the lender only from DelPrete's father's accounts. DelPrete, and not his father, is properly seen as the primary borrower here. This project was the son's alone, and his father's role, as between them, was one of secondary liability. And yet, the bulk of the loss was borne by his father, out of his savings accounts. In addition, DelPrete really has not paid out of his own funds any substantial part of the consideration recited in the deed to him from his father and uncle. The $80,000 that went to his

uncle's side of the family was, I find, advanced by the father, Frank, and not the son, Robert. And Robert never came out of pocket for the second $80,000 of the deed consideration, which of right was due his father.

I do not find that DelPrete suffered no real loss as a result of the revocation of the permits issued by the Town for the building on the Property. It is clear that he incurred large sums of legal fees and other related costs, directly as a result of the zoning enforcement by the Town. DelPrete has been left with sizeable bills and debts. But, at this juncture at least, his exposure has been cushioned considerably by the use of his father's funds to repay the bank loans DelPrete otherwise would have had to repay himself. I appreciate that others in the family take the position that these funds ought not have been applied as they were to repay Robert's project borrowings. These family members believe Robert took advantage of his father; that does seem to be the case. Other proceedings elsewhere may alter what so far has happened in that regard. Currently, however, while I cannot conclude that DelPrete has come out of the zoning enforcement unscathed, he has fared far better than he would have had he alone been financially responsible for the borrowings involved.

C. The Municipal Officials did not Act in Bad Faith

The last factor I consider which may inform the availability of an equitable remedy, rather than a tear-down, is whether the parties acted in good faith. See Deery, 356 Mass. at 537 (no tear down required because, among other things, all parties acted in good faith when a house was too close to a public way in violation of the local zoning by-law).

Here, the balance falls decisively in the Town's favor. I find that DelPrete did not act in good faith in procuring the building permit, and that Ruble behaved with nothing but good faith

in issuing it.

DelPrete behaved improperly. Full of awareness that the Property had serious zoning shortcomings, he prevailed on his relationship with a friendly assistant in the building department, and the inexperience of the relatively new Building Inspector, to obtain a building permit that was, under the circumstances, not supposed to be issued. This is not a case where an innocent resident, unaware of any zoning issues, in good faith applies for a permit which issues when it should not have. DelPrete knowingly received a permit which he well ought have realized he had no right to get. DelPrete did not challenge the assumptions on which the permit issued, asking why and how a building lawfully could be built on this undersized lot. There was no legitimate basis to say this land had some exemption from the zoning laws. To the contrary, the facts all suggested just the opposite–that without a variance (something not really in prospect) the land was unbuildable. DelPrete seized a lucky opportunity, and cavalierly marched ahead with his construction project, ignoring the obvious risks.

Ruble, of course, ought not have issued the permit. An objective look at the title and permitting history of this parcel and of the surrounding land would have led Ruble to conclude that there were no grounds on which a building permit would have been proper. Although Ruble stumbled here, he did so without the slightest bit of bad faith. He deferred to another long-time employee in the department. He gave her and DelPrete the benefit of the doubt. He had no bad motive to issue the requested permit. He simply made an error in good faith.

I find it significant that DelPrete deliberately did not bring in to Ruble the record plans (at least one of which he had received a copy of from his family). Had DelPrete shown Ruble that plan, with its legend warning about the Property's zoning failings, Ruble likely would have been

driven to investigate further, and to uncover the truth about the parcel's zoning insufficiency. When DelPrete caused the Wheatley Plan to be prepared, and then submitted it in connection with his building permit request, DelPrete used a plan that, although obviously prepared based on the recorded plans, did not repeat the zoning caveats found on the recorded plans. This show an absence of good faith by DelPrete. In Steamboat, the Appeals Court did not explicitly find bad faith, but the court did note that the application for the building permit did not show the increase in height which later was determined not to be allowed under the zoning law. 70 Mass. App. Ct. at 605-606. While the plan DelPrete used to secure the erroneous building permit showed the parcel's area and frontage to be below what was required, the decision to omit the warnings about zoning noncompliance from the Wheatley Plan, and to use that to get the ill-fated building permit, shows a lack of good faith on DelPrete's part.

Nothing suggests that Ruble or anyone else on the Town's behalf delayed taking action once the question of the Property's entitlement to the building permit was brought to Ruble's attention. Once Ruble discovered his mistake, he acted quickly to remedy it by putting DelPrete on notice, ordering a revocation of the permits, and directing DelPrete to take appropriate action. That by the time Ruble and the Town became aware of the Property's zoning noncompliance, the project was finished enough for issuance of a certificate of occupancy, is not due to any lack of good faith on Ruble's part, or that of anyone else in the Town's government.[4]

---

[4] In bringing his appeal in this court in the first instance, DelPrete, then represented by counsel, strenuously advanced the position that the delay of the interveners, the Joyces, in bringing the Property's zoning violations to the attention of the Town and its Zoning Enforcement Officer, took away any opportunity for the building permit and certificate of occupancy to be revoked. On summary judgment, the court concluded otherwise. The court ruled that, where a municipality of its own volition pursues enforcement of its zoning bylaw, the delay by a neighbor in bringing the violation to the municipality's attention does not bar the

I find that the municipal officials involved acted in good faith, and DelPrete did not.

****

Having considered the evidence with care, I find and rule that, balancing the factors that may enter into such a calculus, there are not present in the facts of this case sufficient grounds to mandate judicially an equitable alternative to a tear-down order.

I need to make clear what this means and does not mean. As explained earlier, at the time this case was before me prior to appeal, there was in place no order requiring, or even preliminary to, demolition of the building on the Property. An order issued by Ruble on July 10, 2013, after judgment entered in the Land Court, and while the appeal period was still open, ordered DelPrete to prove acquisition of additional land to solve the Property's zoning deficiencies, or to apply for a demolition permit and commence demolition within thirty days.

---

municipality's right to enforcement, which is subject to a six-year statute of limitations. The court's ruling on this point, made March 19, 2013 and entered on the docket that day, is as follows: "Hearing Held on Cross-Motions for Summary Judgment. Attorneys Gossels, Galvin, and Sullivan Appeared and Argued. Court Rules Only in Part on Cross-Motions, Deciding Only that: In Light of Presence of Counterclaim by Municipal Officials for Enforcement Under G.L. c. 40A, § 7, There Is No Need to Decide Whether Original Request for Enforcement Under G.L. c. 40A, § 15 Brought by the Joyces Was Timely Under Connors v. Annino, 460 Mass. 790 (2011). The Failure of an Abutting Neighbor Timely to Appeal Issuance of Building Permit Does Not Operate to Bar the Municipality's Right to Enforce Its Zoning Bylaw. Nothing in the Doctrine of Connors Repeals or Shortens the Otherwise Applicable Six-Year Limitations Period of Section 7 When, as Here, the Municipality Affirmatively Pursues Enforcement. Because the Municipality Is Pursuing Enforcement, the Court Also Need Not Consider Whether, How and When the Joyces First Acquired Sufficient Awareness of the DelPrete Lot's Lack of Compliance with the Dimensional Requirements of the Zoning Bylaw and/or Failure to Qualify as Protected Prior Nonconforming." This ruling was upheld by the Appeals Court panel which heard the appeal of the judgment in this case. Nothing in the subsequent proceedings in this case causes me to depart from it. The Joyces may have brought the noncompliance of the Property to Rubles attention only after the house was built. Had Ruble and the Town declined to take enforcement measures, the Joyces would not have been able to force enforcement. But here, the municipality, once made aware of the erroneously issued permit, acted firmly and without delay in enforcing the local zoning law. The statute of limitations on enforcement still had years left to run.

In its memorandum and order, the Appeals Court panel helpfully and thoroughly explained the factors a court must consider in deciding whether there exists, on balance, grounds that would counsel a judge to impose an equitable alternative to a tear-down order. After trial and reflection on the evidence, I have performed that analysis. I have concluded that there do not exist on the facts of this case grounds for a judge to impose an equitable alternative to demolition, should a proper order by the appropriate municipal officials calling for that demolition be in place.

I do not, however, find that such an order currently is in place. I do not regard the July 10, 2013 order by Ruble to be such an order. First, by its terms, it is conditional, calling for demolition only as an alternative to other opportunities; the order does not clearly mandate that demolition proceed at once.

Second, and far more importantly, the order issued in 2013 has not been reviewed, as it ought have been, by the Board on administrative appeal. The municipal parties make much of the fact that DelPrete, then still represented by counsel, did not take an administrative appeal from the order to the Board within the time for doing so. This may be so. But, under the circumstances, I do not attach any great legal significance to that. The order issued, by its own language, on the strength of this court's judgment, entered only days earlier, which at the time of the order was subject to rights of appeal to the Appeals Court. That appeal was claimed, pursued, and, ultimately led to the vacation of this court's judgment. Given this procedural posture, it hardly is fair and equitable to treat the 2013 order as now final and beyond any appeal administratively to the Board. Fairness and equity require that the 2013 order be treated as of no effect, having been issued prematurely. A new order may issue once the judgment after remand

in this case enters and becomes final.

Absent a final and unconditional order for demolition from the Zoning Enforcement Officer, upheld by the Board on any administrative appeal which may be taken, I am not prepared to enter a judgment directing the demolition of the building built by DelPrete on the Property. If the Zoning Enforcement Officer hereafter issues such an order, it will be appealable to the Board in accordance with the provisions of G.L. c. 40A. There are strict deadlines imposed by the statute for taking such an administrative appeal to the Board. If a timely appeal is taken to the Board, the Board's decision will be appealable to this court by any party currently a party to this action, or, if taken by any other party, to any court of competent jurisdiction.

The officials of the Town are free to act in any lawful manner, as they see fit, on the question of the remedy or remedies to be taken with respect to the zoning violations at the Property. Although I have decided--as the Appeals Court required me to do--how the balance of equitable factors comes out on the question whether a judge might fashion a remedy short of demolition as an alternative to a tear-down order (ruling that those factors do not require imposing such an alternative), that does not mean that officials in the Town are obliged to reach the same result. The officials in the Town, after the necessary deliberation, may proceed as the law, and the discretion they enjoy under it, lead them to act.

Judgment accordingly.

Gordon H. Piper
Justice

Dated: April 6, 2016

SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, ss.

MISCELLANEOUS CASE
No. 12 MISC 458553 (GHP)

ROBERT DELPRETE,
Plaintiff,

v.

THOMAS RUBLE, as he is Building Inspector and Zoning Enforcement Officer for the Town of Rockland; TOWN OF ROCKLAND ZONING BOARD OF APPEALS; TOWN OF ROCKLAND BOARD OF SELECTMEN; and TOWN OF ROCKLAND;
Defendants,

and

SUSAN A. JOYCE and THOMAS J. JOYCE,
Interveners.

JUDGMENT
AFTER RESCRIPT

This action commenced in this court on January 26, 2012. It is an appeal pursuant to G.L. c. 40A, § 17 of a decision[1] of the Rockland Zoning Board of Appeals. The complaint was amended on December 10, 2012. The municipal defendants filed a counterclaim for enforcement pursuant to G.L. c. 40A, § 7.

This case came on to be heard by the court (Piper, J.) March 19, 2013 on cross motions for summary judgment. On that date, the court laid upon the record from the bench certain

[1]The challenged decision was filed with the Town Clerk on January 17, 2012.

rulings of law, and directed further briefing. After receiving supplemental filings of the parties, the court (Piper, J.) rendered its rulings in a written decision dated July 2, 2013, and judgment entered that day.

Plaintiff noticed an appeal of the judgment to the Appeals Court. In the appeal of this case in the Appeals Court, No. 2013-P-1749, the Appeals Court vacated that judgment, and remanded to this court for further proceedings consistent with the memorandum and order of the panel of the Appeals Court, dated February 4, 2015, issued by it pursuant to its Rule 1:28. Rescript issued from the Appeals Court and was docketed March 4, 2015. DelPrete v. Zoning Bd. of Appeals of Rockland, 87 Mass. App. Ct. 1104 (2015). The remand was "for the limited purpose of consideration of the factors which may inform an equitable remedy determination...." The Appeals Court upheld the remainder of this court's judgment.

This case came on for trial by the court on the issues for which the case was remanded to this court. In a decision of even date, the court (Piper, J.) has made findings of facts and rulings of law. In accordance with the court's decision issued this day, it is

ORDERED and ADJUDGED that the decision of the Rockland Zoning Board of Appeals filed with the Rockland Town Clerk on January 17, 2012 is not arbitrary, capricious, contrary to law or otherwise entitled to be modified or overturned. The decision of the Board is AFFIRMED, and shall stand as issued. It is further

ORDERED and ADJUDGED that the Board and the Building Inspector and Zoning Enforcement Officer for the Town of Rockland are to take all appropriate action in light of the court's decisions and this Judgment. The order of the Town's Zoning Enforcement Officer[2] dated July 10, 2013 is of no force and effect. A new order of enforcement with respect to the Property involved in this case may be issued by the Zoning Enforcement Officer at such time, and with such lawful terms and provisions, as the Zoning Enforcement Officer may determine appropriate, provided however, that no such order shall require physical alteration or demolition of the structure on the Property, if at all, to take place at any time prior to this Judgment

[2]Terms used in this Judgment and not defined in it have the meanings given in the Decision.

becoming final. Any order of enforcement shall be subject to administrative appeal to the Board in accordance with the provisions of G.L. c. 40A. Any decision of the Board rendered on an administrative appeal shall be subject to appeal by any proper party to a court in accordance with G.L. c. 40A, §17. Any such judicial appeal may be brought in any court of competent jurisdiction, provided, however, that if such a judicial appeal is sought by any party currently a party to this case, the appeal shall be brought in this court. It is further

ORDERED and ADJUDGED that, balancing the factors that may enter into such a ' calculus, there are not present in the facts of this case as tried to the court sufficient grounds to require a judge to impose an equitable alternative to a tear-down order, should a lawful, final, order for demolition be issued by the local officials and then be reviewed on judicial appeal, including following administrative appeal in the Town, if taken. The officials in the Town may, if they determine it to be a lawful and appropriate result, order a remedy or remedies for the zoning violations at the Property that include physical alteration or demolition of the structure there, but, notwithstanding the preceding sentence of this Judgment, the officials in the Town are in no manner ordered or obliged to do so. They, after necessary deliberation, may proceed with enforcement as the law, and the discretion they enjoy under it, lead them to act. It is further

ORDERED and ADJUDGED that no other or further relief, and no damages, costs, fees or other amounts, are awarded to any party.

By the Court. (Piper, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: April 6, 2016

TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER